

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MELVIN T. SMITH, :

4 Petitioner :

5 v. : No. 03-8661

6 MASSACHUSETTS. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, December 1, 2004

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:03 a.m.

13 APPEARANCES:

14 DAVID J. NATHANSON, ESQ., Boston, Massachusetts; on behalf

15 of the Petitioner.

16 CATHRYN A. NEAVES, ESQ., Assistant Attorney General,

17 Boston, Massachusetts; on behalf of the Respondent.

18 SRI SRINIVASAN, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of the United States, as amicus curiae,

21 supporting the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

JUSTICE STEVENS: We'll hear argument in the
case of Smith against Massachusetts.

Mr. Nathanson.

ORAL ARGUMENT OF DAVID J. NATHANSON
ON BEHALF OF THE PETITIONER

MR. NATHANSON: Justice Stevens, and may it
please the Court:

The trial judge found Melvin Smith not guilty on
the merits and unequivocally so. That acquittal entitled
Melvin Smith to repose. Instead, what he got was a moving
target. The trial judge's later reconsideration of
Smith's acquittal placed him in jeopardy for that same
offense twice.

Smith's position on the matter is completely
faithful to this Court's precedent, and it makes sense in
the real-world practice of criminal law.

The State, on the other hand, asks this Court to
make exceptions to the rule, long-held, that acquittals
terminate jeopardy.

JUSTICE GINSBURG: No. Just to say that this --
what happened here was not a final determination.

Take an analog -- an analogy to rule 54(b). The
judge can say, yes, I've made this ruling and it sticks.

1 You see, I'm going to give you a separate piece of paper
2 that says judgment, but if I don't give you that separate
3 piece of paper, even though I said judgment granted, it
4 doesn't count until the very end of the case. I can
5 always change my mind. Why shouldn't it operate the same
6 way on the criminal side?

7 MR. NATHANSON: Well, first of all, obviously,
8 that's a civil case. The Double Jeopardy Clause doesn't
9 apply to civil cases. Second of all -- except with some
10 rare exceptions.

11 What I think the best way to -- to really define
12 finality here -- and -- and whatever finality is, I really
13 do think we -- we do have it here because this Court has
14 said an acquittal under Martin Linen, a resolution,
15 correct or not, of some or all if the factual elements --

16 JUSTICE GINSBURG: Yes, but I looked at Martin
17 Linen, and there, there was something labeled judgment of
18 acquittal entered. Here we have an endorsement on a
19 motion, and then we have an entry by the clerk saying --
20 what does the entry say? Motion granted or something like
21 that.

22 MR. NATHANSON: Allowed, and it was attested by
23 the clerk.

24 JUSTICE GINSBURG: Yes. But is there -- this
25 might be significant. Is there in Massachusetts, when a

1 motion for acquittal is granted and there are other
2 charges still going on, is there a piece of paper that
3 says, judgment, acquitted on count whatever it was?

4 MR. NATHANSON: No, Your Honor. The -- the
5 formal rule, which is not always observed, but the formal
6 rule is that it must be recorded on -- on the docket and
7 announced in an open courtroom. That happened here.

8 JUSTICE KENNEDY: Well, suppose you have a State
9 and the State has a statute, and the statute says any
10 motion for acquittal may be granted by the -- the trial
11 court at the close of the prosecution's evidence, but that
12 motion shall not be deemed final and may be reviewed by
13 the district court at any time before -- or by the trial
14 court at any time before the submission of the case to the
15 jury. Then there's no repose element because the -- the
16 defendant is on notice that this may not be final. What
17 would be the -- your position in that case if a statute
18 like that were on the books? And if you say that that's
19 different, then I'll say, well, suppose the supreme court
20 of Massachusetts just makes up this rule as a judicial
21 matter.

22 MR. NATHANSON: Well, to answer the first
23 question, I think that if -- if such a statute were
24 enacted, I'm willing to grant, for purposes of this case,
25 that it wouldn't be a double jeopardy problem. It may in

1 a later case -- and you know, I'd be very interested in
2 that -- a problem under a combination of Jackson and
3 Winship because the defendant may have a -- a right to
4 that determination.

5 JUSTICE KENNEDY: Okay, well, let -- let's just
6 assume that you've conceded that. Now, you've been
7 guarded about it. If we can do that by statute, why can't
8 we do that by a judicial decision by the supreme court of
9 -- Judicial Court of Massachusetts?

10 MR. NATHANSON: Well, first of all, the Supreme
11 Judicial Court of Massachusetts is the one who promulgated
12 the rules in this case. Rule 25(a) is promulgated by the
13 Supreme Judicial Court of --

14 JUSTICE KENNEDY: Well, but they put a gloss on
15 the rule by their decision.

16 MR. NATHANSON: Well, that was the Massachusetts
17 Appeals Court, I might add.

18 Second of all, the rule itself requires that the
19 motion shall be ruled upon at that time. It says nothing
20 about reconsideration, and clearly --

21 JUSTICE BREYER: They've held that in this case.
22 We have a Massachusetts decision. It's their law and
23 under their law in Massachusetts, the judge can revise it.

24 MR. NATHANSON: Actually --

25 JUSTICE BREYER: Well, if it isn't their law,

1 then I don't know how -- why they affirmed this conviction
2 rather than reversing it.

3 MR. NATHANSON: I'm not sure I know either, Your
4 Honor.

5 JUSTICE BREYER: All right, but I mean, I -- I
6 take it that it is their law, otherwise I'd see reversal,
7 wouldn't I, and not affirmance?

8 MR. NATHANSON: Actually I think what they
9 did --

10 JUSTICE BREYER: What?

11 MR. NATHANSON: -- Your Honor, is they assumed
12 that there was an error in -- in -- when dealing strictly
13 with the rule, at the -- at the end of the section dealing
14 with this, they assume that there was an error and said no
15 prejudice, which I've contended in the brief --

16 JUSTICE BREYER: So -- so in other words,
17 they're saying that in this case -- how could there not be
18 prejudice? He had another trial. I mean -- how could --
19 I don't understand this from beginning to end then.

20 But let me go back to my original question.
21 What rule do you propose?

22 MR. NATHANSON: As for finality, the rule I
23 propose is, first of all, we have to start with the basic
24 foundation, which is an acquittal, under Martin Linen with
25 a resolution --

1 JUSTICE BREYER: What I'm saying is, for double
2 jeopardy purposes --

3 MR. NATHANSON: Yes.

4 JUSTICE BREYER: -- an acquittal in your view is
5 an acquittal for double jeopardy purposes when?

6 MR. NATHANSON: There's -- there's three things
7 that I think Court should look at. One, first of all,
8 because we treat acquittals from the bench for double
9 jeopardy purposes the same as acquittals from a jury, a
10 prosecutor can poll a jury immediately after the verdict.
11 A prosecutor clearly --

12 JUSTICE BREYER: No. I'm asking you for a --
13 I'd have to write -- if I agreed with you, I'd have to say
14 we have here a judge who changed his mind. Under the
15 clause of the Constitution, a judge cannot change his mind
16 when. Now, go ahead. Now, fill in the blanks.

17 MR. NATHANSON: Yes.

18 JUSTICE BREYER: According -- I know what their
19 rule is. Their rule is a judge can change his mind up to
20 the point that the jury is dismissed, something like that.
21 I understand that. Now, I want to know what your rule --
22 is your rule a judge cannot change his mind once he writes
23 the word acquittal on a piece of paper, even if he says,
24 oh my God, I meant to say no acquittal? Too late. Too
25 late. Okay, now, so I want to know what your rule is. Is

1 that the rule?

2 MR. NATHANSON: No, Your Honor.

3 JUSTICE BREYER: Okay. What is the rule?

4 MR. NATHANSON: The -- your first question --
5 the constitutional point of no return, shall we say, is
6 further proceedings. If there is an acquittal and there
7 are further proceedings --

8 JUSTICE BREYER: There is no further proceeding
9 if he writes the word acquittal, I guess until he changes
10 his mind. So 3 minutes later, he says I change my mind.
11 Now there are further proceedings.

12 MR. NATHANSON: Well, then at that point you
13 look to other indicia of finality that this -- this Court
14 referenced that in -- in Vincent, and that -- that's
15 generally compliance with State procedure. Compliance
16 with State procedures --

17 JUSTICE BREYER: But I need to write a simple
18 rule. All I'm trying to get from you is what is your
19 rule. Is your rule that when a judge writes the word
20 acquittal -- an acquittal, by the way, happens to mean
21 there's nothing left for the jury to do on that charge.
22 That's what it means. When he writes the word acquittal,
23 he cannot change it. Is that your rule?

24 MR. NATHANSON: No. The rule is that the --

25 JUSTICE BREYER: Okay. And what is your rule?

1 MR. NATHANSON: The rule is that the judge
2 cannot change it, as a matter of Federal constitutional
3 law, if there are further proceedings. In a multi-count
4 case, count A is acquitted. We initiate further
5 proceedings on count B and C.

6 JUSTICE O'CONNOR: But your answer just isn't
7 responsive. When has it become final?

8 MR. NATHANSON: It ripens at the --

9 JUSTICE O'CONNOR: When? When the judge says
10 something, when he writes something? When does it become
11 final? At what point in time?

12 MR. NATHANSON: What I'm suggesting is --

13 JUSTICE O'CONNOR: What is your proposed rule?
14 You haven't said yet.

15 MR. NATHANSON: What -- what I'm suggesting is
16 -- is two things.

17 JUSTICE O'CONNOR: Just one thing. Just when
18 does it become final? Let's limit it to one thing.

19 MR. NATHANSON: It -- it becomes final when
20 there are further proceedings initiated.

21 JUSTICE BREYER: Sorry. I don't understand
22 that.

23 JUSTICE O'CONNOR: That doesn't make sense.

24 MR. NATHANSON: The -- the -- that is the line
25 drawn by most of the lower courts.

1 JUSTICE BREYER: You're not understanding my
2 question then. Imagine a case in which a judge writes the
3 word acquittal. Now, half an hour later, he thinks, oh,
4 my God, what have I done. The jury is still sitting
5 there. Of course, they're sitting there because he hasn't
6 had a chance to dismiss them yet. They happened to be
7 having lunch or something. Is it final?

8 MR. NATHANSON: It is not final --

9 JUSTICE BREYER: It is not final.

10 MR. NATHANSON: -- if -- if the defense has not
11 been forced at that point to choose to rest or put on a
12 case. That is the --

13 JUSTICE BREYER: Say that again.

14 MR. NATHANSON: If the defense is forced to rest
15 or put on a case.

16 JUSTICE BREYER: But he wrote the word
17 acquittal. There's nothing more for anybody to do until
18 he changes the word.

19 MR. NATHANSON: Well, I think we're talking
20 about two separate things. Is Your Honor's question
21 presupposing a single-count case or a multi-count?

22 JUSTICE BREYER: Let's try single-count. Okay?

23 MR. NATHANSON: Okay.

24 JUSTICE BREYER: There he is. He writes the
25 word acquittal and the jury says, oh, what do we do now?

1 Go home, says the clerk. Now, before they can get out the
2 door or anything else happens, before they get out the
3 door, he says, oh, my God, I made a mistake. Can he do
4 that under your rule?

5 MR. NATHANSON: I'm not entirely sure of the
6 answer to the question, Your Honor, but I -- I think,
7 first of all, we look at compliance with State procedure.

8 JUSTICE BREYER: Okay. What I thought from
9 reading your brief, which you're confirming, is your rule
10 -- once the judge says acquittal, that's the end of it.
11 If he decides 3 seconds later, he cannot change his mind.
12 Now, that rule to me is inconsistent with most law.

13 MR. NATHANSON: If we're talking about a
14 clerical error, Your Honor, the Massachusetts rules and
15 the Federal rules provide for correction of clerical
16 errors. What -- what we're talking about here is not a
17 clerical error, but the judge clearly intended to do what
18 she did.

19 JUSTICE O'CONNOR: Well, was your client --

20 JUSTICE GINSBURG: But a very plain error --

21 JUSTICE O'CONNOR: -- was your client prejudiced
22 in any way by not putting on some evidence that the -- he
23 would have put on?

24 MR. NATHANSON: May I begin, Your Honor --

25 JUSTICE O'CONNOR: Just answer the question for

1 once.

2 MR. NATHANSON: Yes, Your Honor. There -- there
3 was a defense that he essentially forfeited by not being
4 aware that the judge was going to, at some point --

5 JUSTICE GINSBURG: But that was a terribly risky
6 defense because his main defense is I wasn't there, I
7 didn't do it, somebody else did it. How could he then
8 turn around and say I missed the opportunity to tell the
9 jury I really was there, but it was okay for me to have
10 the gun? I mean, what -- what defense counsel would do
11 that after having spent his whole effort to say it was the
12 other guy, it wasn't this defendant? And then to make
13 this defense that he had a right to possess this gun
14 because he belonged in the house, that would be
15 extraordinary.

16 MR. NATHANSON: Your Honor, counsel for co-
17 defendant, Felicia Brown, presented just such a defense
18 and she was acquitted. She presented the defense that
19 Melvin Smith did not shoot Christopher Robinson, but if
20 Melvin --

21 JUSTICE GINSBURG: Nobody charged her with
22 possessing a gun.

23 MR. NATHANSON: But what I'm saying is --

24 JUSTICE GINSBURG: That's -- look, there were a
25 lot of charges in this case, and we're dealing with what

1 is a relatively lesser offense of this whole string of
2 events so that Brown being acquitted of other offenses
3 doesn't say anything about this offense, which relates to
4 the possession of a gun. That's -- that's all that it is.

5 MR. NATHANSON: What I'm saying is that it
6 wasn't risky, Your Honor, because the -- this jury was
7 willing to consider an alternative defense that would have
8 otherwise appeared as a concession. They did not take it
9 as a concession.

10 JUSTICE GINSBURG: But he would be -- the
11 defendant -- you know, he hasn't gone to the jury yet, and
12 the jury would say, my goodness, this is like a common law
13 pleader. I didn't borrow the kettle. It was broken when
14 I got it. I returned it unbroken. To -- to do that, to
15 say I wasn't there, that's my main defense, but then,
16 jury, I'd like you also to consider that if you think that
17 I was there, then -- it -- it really doesn't fly as a
18 criminal defense.

19 MR. NATHANSON: I'd just respectfully disagree,
20 Your Honor. But -- but the -- the larger point is if we
21 allow this rule in general, we are going to engender
22 serious problems. I'm saying that there -- that there was
23 some reliance here, but we're going to engender much more
24 serious problems in other cases where a defendant perhaps
25 presents a defense that is helpful to the remaining

1 charges, but damaging on the acquitted charge.

2 JUSTICE KENNEDY: Well, but if -- if -- you
3 know, we shape the expectation by what we say. If -- if
4 we say that a judge is always free to consider his rule
5 and as long as the -- there's a right to reopen, then any
6 kind of reliance is -- is misplaced.

7 MR. NATHANSON: What Massachusetts law says in
8 -- in the Zavala case, they said that there is not a right
9 to reopen where the judge has determined that the evidence
10 is insufficient.

11 Second of all --

12 JUSTICE GINSBURG: That is when the case is not
13 ongoing. I mean, here we had a case that was continuing
14 and -- and the judge said, oops, I made a mistake, which
15 is common at the trial level. I mean, these decisions --
16 she made this decision in a split second. Maybe she was
17 too hasty, and then a trial judge will say, my law clerk
18 went to the library at lunch, there was a Supreme Judicial
19 Court of Massachusetts case going just the other way, so
20 of course, I confess error, but the defendant isn't
21 prejudice.

22 The defendant hadn't put on a -- well, the -- it
23 came up at closing. Right? So if the defendant was
24 prejudice, anyway he could have said, wait a minute,
25 judge, I want to put on that defense that I really was

1 there but I had a right to have the gun.

2 MR. NATHANSON: He didn't say that, Your Honor.

3 JUSTICE GINSBURG: But he could have. So he --
4 so I don't see that you have a realistic claim of
5 prejudice.

6 MR. NATHANSON: Well, I -- I don't think
7 prejudice is a factor in double jeopardy jurisprudence.
8 Either the defendant has been placed twice in jeopardy or
9 he has not.

10 JUSTICE GINSBURG: Yes, but you have to set a --
11 a point in time, and your point is -- well, it's not
12 exactly clear, but there's one point that says when the
13 jury is discharged. Then there may be other reasons why
14 there's unfairness to the defendant so that you wouldn't
15 permit it, other than double jeopardy. But if -- why
16 isn't that a sensible place to draw the line?

17 MR. NATHANSON: Because if -- if discharge of
18 the jury is the rule, then the judge can reconsider an
19 acquittal at any point in a defendant's case. 2 weeks
20 into a defense case, the judge could reconsider an
21 acquittal.

22 JUSTICE GINSBURG: The question -- we're talking
23 about a Federal constitutional rule, and suppose -- you
24 pointed out this went only to an intermediate appellate
25 court. Suppose the Massachusetts Supreme Judicial Court

1 interpreted its rule at 25(a) and it says, that rule
2 allows some leeway for the judge to say I got it wrong as
3 long as there's no prejudice to the defense. That's what
4 our rule means.

5 MR. NATHANSON: I don't think that's
6 permissible, Your Honor. It -- it is -- granted, for
7 purposes of this argument, that it's permissible for
8 States to order judges to withhold rulings, that there
9 shall be no ruling on the sufficiency of the evidence
10 prior to the return of a jury verdict. Louisiana, for
11 example, does that, and I think Oklahoma.

12 But for the Supreme Judicial -- Judicial Court
13 of Massachusetts to say that an acquittal has no force is
14 simply straight contravening what this Court has said.
15 It's -- it's essentially a continuing jeopardy argument.

16 JUSTICE SOUTER: Well, you do agree, I take it,
17 that if the judge says, yes, I agree with you, there isn't
18 a scintilla of evidence, and -- and at some point I'm --
19 I'm going to enter an acquittal, but I'm not going to do
20 it now just in case I have a second thought, but at least
21 by the -- the end of the trial, I'll take care of it, you,
22 I take it, concede that that is permissible.

23 MR. NATHANSON: I think that is permissible
24 because --

25 JUSTICE SOUTER: Well, if that -- if that's

1 permissible, if you win this case, isn't that going to be
2 the way trials are conducted when -- when there are mid-
3 trial motions like yours? Every judge is going to say,
4 yes, looks as though you -- you got them there, but I'll
5 -- I'll just hold onto this until things are over, and
6 then I'll rule. That's -- that's the way they're all
7 going to respond, isn't it?

8 MR. NATHANSON: No, I don't think so, Your
9 Honor. I think judges are -- are intelligent people.
10 They read the pleadings beforehand. Justice Donovan
11 clearly read the pleading beforehand in this case, and she
12 -- she was prepared to ask for argument on it. I don't
13 think that judges do these things so precipitously that
14 they are not going to be confident in their ruling.

15 JUSTICE SOUTER: No, but every judge knows he
16 drops a catch once in a while, and -- and if he wants to
17 guard against wrecking the whole trial or -- or creating
18 an appellate issue later, he's just going to be cautious
19 and hold onto it.

20 MR. NATHANSON: And judges should be cautious,
21 Your Honor.

22 JUSTICE STEVENS: But isn't it also important to
23 know, though, whether the defendant has to put on a case
24 or not? So he can't just reserve judgment. I'll tell you
25 after the trial is over whether you should put a case on

1 or not.

2 MR. NATHANSON: That -- that is, in fact, the
3 point, Justice Stevens. The Double Jeopardy Clause is a
4 constitutional policy of finality for the defendant's
5 benefit. He -- that's what this Court said in *Jorn*. The
6 defendant has to know whether he -- he's defending a case.

7 JUSTICE SOUTER: But does -- does --

8 JUSTICE KENNEDY: Did the defendant here ask to
9 be -- to have the right to reopen?

10 MR. NATHANSON: He did not.

11 JUSTICE O'CONNOR: May I ask --

12 JUSTICE SOUTER: Did he --

13 JUSTICE O'CONNOR: -- you another question here?
14 There -- there were three charges against your client, as
15 I understand it. Unlawful possession of a firearm.
16 That's the one we're talking about.

17 MR. NATHANSON: Yes, Your Honor.

18 JUSTICE O'CONNOR: Assault with intent to
19 murder.

20 MR. NATHANSON: Yes.

21 JUSTICE O'CONNOR: Assault and battery by means
22 of a dangerous weapon.

23 MR. NATHANSON: Yes.

24 JUSTICE O'CONNOR: The jury convicted on all
25 three.

1 a barrel less than 16 inches. So is there any evidence
2 here of the shotgun? And she, I guess, forgot that there
3 was a lot of evidence that it was a pistol. Now, there
4 aren't many pistols that are 16 inches long. So she's
5 thinking, something may be missing here. She's a little
6 uncertain, but she writes acquittal, and then a few
7 minutes later, she thinks, let's say, oh, my God, there
8 was all that evidence about the pistol. So I shouldn't
9 have done that.

10 I mean, how -- how is a judge like that, a
11 hypothetical -- what's she supposed to do? Is she
12 supposed to say, I better not enter anything, because
13 after all, I don't care if the defendant has to produce a
14 case? Or is she supposed to enter something and think,
15 well, I could change my mind before it's over? Or what is
16 she supposed to do? She just thinks she made a mistake.

17 MR. NATHANSON: So your hypothetical is that
18 there's evidence of two guns?

19 JUSTICE BREYER: I thought here there was
20 evidence there was a pistol, but maybe I'm wrong.

21 MR. NATHANSON: I'm sorry. Yes, in this case --

22 JUSTICE BREYER: There was evidence it was a
23 pistol. So I -- I would have thought, reading this, that
24 there was evidence. That's beside the point, but I'm --
25 I'm just using it as an example where a judge might think

1 she made a mistake. She thought there was no evidence
2 that it wasn't a shotgun, and I guess she forgot that
3 there was evidence it was a pistol and a pistol is not a
4 shotgun.

5 MR. NATHANSON: She -- she clearly didn't
6 forget. The prosecutor said to her the evidence was
7 testified to that it was a pistol, it was a revolver, it
8 was a .32 --

9 JUSTICE BREYER: Well, I'm quite sure -- not
10 quite sure then why she wrote down there was no evidence
11 it wasn't a shotgun, but she had some reason. And now a
12 few minutes later, she thinks, boy, whatever my reason is,
13 it couldn't have been that good. Or maybe she thinks that
14 that's a reason an hour from now or maybe a day from now.
15 What's the line? Suppose she thinks of it a second from
16 now. Suppose she thinks the instant she writes acquittal,
17 she thought, oh, my God, a pistol is not a shotgun. Of
18 course, it isn't. I know that. I better change it. Is
19 it a second from now? Is it she can never change it no
20 matter what once the pen leaves the paper? What's your
21 rule?

22 MR. NATHANSON: In a single-count case, Your
23 Honor --

24 JUSTICE BREYER: I don't care whether it's
25 single-count or double-count or triple-count. I want to

1 know what -- how you see it, not how I see it.

2 MR. NATHANSON: It -- compliance with State
3 procedure informs the inquiry and once -- once we have
4 what is determined to be a resolution --

5 JUSTICE SCALIA: Once it's final under State
6 procedure, right? And you also would add once there's no
7 clerical error. She didn't mistakenly say, you know,
8 affirm when she meant to write deny. Leaving that aside,
9 once it's final under State procedure, it's final.

10 MR. NATHANSON: That's correct, Your Honor.

11 JUSTICE SCALIA: And sometimes it's wrong.

12 MR. NATHANSON: That's correct.

13 JUSTICE SCALIA: But it'd be sometimes wrong no
14 matter how you define final. I mean, you know, if she
15 let's --

16 JUSTICE BREYER: That's excellent.

17 JUSTICE SCALIA: -- let's all the evidence on
18 and -- and does it after all the evidence is there, and
19 then she -- and then at the close of all the evidence, she
20 gives a directed verdict for -- for the defendant, and
21 then discharges the jury, and as soon as the jury walks
22 out, oh, my God, what a mistake I made. Too bad. Right?
23 I mean, we say double jeopardy.

24 MR. NATHANSON: Correct, Your Honor. That's
25 what --

1 JUSTICE BREYER: Excellent. That was an
2 excellent answer.

3 (Laughter.)

4 JUSTICE BREYER: Now, I would like to know,
5 given that answer, why is this final under State procedure
6 because it seems as if the State courts of Massachusetts
7 have said, no, it is not a constitutional error to go and
8 look into this again. She can change her mind. And
9 that's what I'd like you to focus on because I agree that
10 that was a good explanation of the rule.

11 MR. NATHANSON: If -- if State procedure, as in
12 this --

13 JUSTICE BREYER: I'm thinking of this case.

14 MR. NATHANSON: Yes.

15 JUSTICE BREYER: Suppose I took Justice Scalia's
16 rule and I said, that's the rule. Now, I would say that's
17 the rule of a Federal law. Very well. That turns on your
18 decision here being final as a matter of State law, but it
19 seems to me we have State courts here saying, at least for
20 double jeopardy purposes, it isn't final as a matter of
21 State law. And therefore, I want to know how we reach
22 your conclusion here.

23 MR. NATHANSON: Well, there's -- there clearly
24 is a line beyond which the State cannot go, and that's
25 what Justice Brennan was talking about in his concurrence

1 in Lydon. He said the -- the State cannot fashion a
2 procedure whereby the judge never discharges the jury, and
3 in -- in Kepner, this Court held that the Philippine
4 procedure of withholding finality from an acquittal in a
5 bench trial also violated the Constitution. So State
6 procedure does not control. It is sufficient but not
7 necessary.

8 If -- if you comply with State procedure to say
9 this is -- this is an acquittal, okay, it's an acquittal.
10 If you do not comply with State procedure, it can still be
11 an acquittal under Federal law.

12 JUSTICE SCALIA: Does the State have the power
13 to say whether -- whether an acquittal under State law
14 constitutes an acquittal for purposes of Federal
15 constitutional double jeopardy purposes? Is that a State
16 law question or a Federal question?

17 MR. NATHANSON: No. It -- it is a Federal
18 question, Your Honor. This Court --

19 JUSTICE SCALIA: I thought it was.

20 MR. NATHANSON: -- this Court said that in
21 Smalis quite clearly.

22 If I -- if I may, two things and then I'd like
23 to reserve. But the -- the State would have this Court
24 draw a distinction between acquittals by a judge and
25 acquittals by a jury. That simply has been rejected by

1 this Court numerous times. Sanabria, Rumsey. An
2 acquittal is an acquittal.

3 Again, the -- the State would have this Court
4 draw distinctions between acquittals based on law and
5 acquittals based on fact. Sanabria unequivocally rejected
6 that. Sanabria says that in fact sufficiency of the
7 evidence is not a legal defense. An acquittal is an
8 acquittal.

9 If there are no further questions, I'd like to
10 reserve the balance of my time.

11 JUSTICE STEVENS: Yes.

12 Ms. Neaves.

13 ORAL ARGUMENT OF CATHRYN A. NEAVES

14 ON BEHALF OF THE RESPONDENT

15 MS. NEAVES: Justice Stevens, and may it please
16 the Court:

17 I'd like to start with where the Court left off
18 on the notion of reconsideration and finality. The
19 Massachusetts Appeals Court here specifically stated that
20 a judge's right to reconsider his or her legal rulings is
21 firmly rooted in the common law and permitted Judge
22 Donovan in this case to reconsider her legal ruling that
23 the evidence was insufficient. Certainly that common law
24 right of reconsideration could not run afoul of this
25 Court's double jeopardy jurisprudence, but the appeals

1 court specifically stated that the Double Jeopardy Clause
2 was not violated because there was no second proceeding
3 and that the judge in this case, therefore, was permitted
4 to reconsider her ruling.

5 JUSTICE SCALIA: What if -- what if this had
6 been the sole count, the gun possession count had been the
7 sole count, and -- and the same ruling had been made by
8 the judge? Would you say that there was double jeopardy
9 attaching or not?

10 MS. NEAVES: Not so long as the jury was still
11 there. If the prosecutor had the opportunity to say,
12 Judge Donovan, give me 10 minutes, I know there's a
13 Supreme Judicial Court case on the point that I'm arguing
14 to you, which is that you did not need a witness to
15 directly testify that the gun barrel length was less than
16 16 inches, I know there's a case, give me 10 minutes, take
17 a recess, and if the judge agreed to do that and the
18 prosecutor came back and gave the case to the judge and
19 the judge said, absolutely, you're -- you're correct, I'm
20 going to send the charge to the jury, there's no double
21 jeopardy violation there.

22 JUSTICE SCALIA: And what if it's a bench trial?

23 MS. NEAVES: A bench trial is a very difficult
24 situation. And the Smalis case certainly seems to be the
25 hardest case here, but bench trials present different -- a

1 different situation because the judge is both the fact-
2 finder and the law-giver. And in that context, it's much
3 more difficult --

4 JUSTICE SCALIA: I know it's difficult. What's
5 your answer?

6 MS. NEAVES: My answer to that is I believe that
7 if the judge stated the evidence is insufficient, as -- as
8 the judge did in Smalis, as the trier of fact and law, I
9 find the evidence --

10 JUSTICE SCALIA: It's over.

11 MS. NEAVES: It's over. It's over.

12 JUSTICE KENNEDY: The minute --

13 JUSTICE STEVENS: What if in the case --

14 JUSTICE KENNEDY: -- the minute he --

15 JUSTICE STEVENS: -- we have before us the State
16 allowed an interlocutory appeal on behalf of the
17 prosecution right after the judge's ruling?

18 MS. NEAVES: In a jury case, Your Honor?

19 JUSTICE STEVENS: Yes.

20 MS. NEAVES: I think --

21 JUSTICE STEVENS: Conceivably they could allow
22 an interlocutory appeal from a judgment of acquittal at
23 the close of the prosecution's case.

24 MS. NEAVES: If such a -- if such a process
25 could be put in place where there was an appellate panel

1 that would be willing and available to hear that while the
2 jury remained empaneled, I don't think it would run afoul
3 of the Double Jeopardy Clause.

4 JUSTICE SOUTER: Well --

5 JUSTICE BREYER: But is that necessary? I -- I
6 mean, that's what I think is the difficult question here.
7 Can you say that it's final for purposes of the decision-
8 maker outside that courtroom, namely an appellate court,
9 but it's not final in respect to the judge having a right
10 to change his mind within the court? That -- that makes a
11 lot of sense to me, but I don't know if it's possible to
12 get there.

13 Why not? I -- I think, well, the reason is that
14 you want judges to be able to reconsider things and you
15 don't have that problem when you're talking about an
16 appeal.

17 MS. NEAVES: That is --

18 JUSTICE BREYER: Or is there any -- is there
19 any, in other words, to reconcile our case that you're
20 talking about, Smalis?

21 MS. NEAVES: The Smalis case?

22 JUSTICE BREYER: Yes, yes.

23 MS. NEAVES: I think there are a number of ways
24 to reconcile it. Certainly Massachusetts' position is
25 that it's the difference between a bench trial and a jury

1 trial, but there is also no doubt that the case left the
2 trial court and went up on appeal. I think both of those
3 factors are significant.

4 JUSTICE SOUTER: Yes, but isn't -- isn't the
5 significance supposedly the existence or nonexistence of
6 our continuation of the jury panel, going back to Justice
7 Stevens' question? And what if the -- what if the State
8 had a procedure whereby the trial judge would simply
9 decline to discharge the jury panel if an appeal were
10 taken from the acquittal motion so that if he was tipped
11 over, it could come right back to the same jury panel?
12 Would -- would the -- would the answer have to be
13 different?

14 MS. NEAVES: I don't think it would.

15 JUSTICE SOUTER: Why?

16 MS. NEAVES: I think -- I think for a -- I think
17 for my -- to my way of thinking about the cases, the jury
18 is what matters and it's the defendant's right to his
19 particular tribunal, and that's the first jury that's
20 empaneled --

21 JUSTICE SOUTER: No, but on my hypothesis he's
22 going to get the same jury.

23 MS. NEAVES: Exactly.

24 JUSTICE SOUTER: They have not been discharged.

25 MS. NEAVES: Exactly. So I would say that it

1 would not be a violation of the Double Jeopardy Clause,
2 and that's why I think --

3 JUSTICE SCALIA: Wow. It goes all the way up on
4 appeal and the jury -- I -- I don't know what the -- I
5 guess he lets the jury go home for a couple of months or
6 while the appeal is pending and then when the decision is
7 overturned by the court of appeals, he comes back and
8 recommences the trial? Wow.

9 JUSTICE SOUTER: All right. If that's so, then
10 why shouldn't Smalis have gone the other way? Because
11 they can send it right back to exactly the same judge.

12 MS. NEAVES: Because he -- he is the trier of
13 fact, and I think at that point --

14 JUSTICE SOUTER: Well, the jury is the trier of
15 fact.

16 MS. NEAVES: That's --

17 JUSTICE SOUTER: I mean, on the hypothesis
18 before, you're saying if they don't discharge the jury and
19 it can go back to them, no double jeopardy problem. In
20 Smalis, it's going to be the same judge. It was a bench
21 trial. It should have come out the other way.

22 MS. NEAVES: Well, I think the difference is the
23 -- the judge in Smalis was the trier of fact. He made a
24 rule -- he is both the trier of fact and the law-giver.
25 He's decided that the evidence is insufficient. If that

1 case goes up on appeal, that is -- that is factual -- that
2 is oversight of his factual determination in essence.

3 JUSTICE GINSBURG: Isn't it very true --

4 JUSTICE KENNEDY: Is -- is another -- is another
5 difference -- and I don't know if this -- is another
6 difference that in the hypothetical case with the jury,
7 the jury has not yet deliberated --

8 MS. NEAVES: Thank you.

9 JUSTICE KENNEDY: -- in order to consider the
10 facts.

11 MS. NEAVES: Yes.

12 JUSTICE KENNEDY: Whereas in your --

13 JUSTICE STEVENS: Yes, but --

14 JUSTICE KENNEDY: -- your case, the -- the judge
15 is -- is --

16 JUSTICE STEVENS: May I ask this?

17 JUSTICE KENNEDY: -- apparently deliberating --

18 JUSTICE STEVENS: Is it not true that in this --

19 MS. NEAVES: That's where I was headed.

20 JUSTICE STEVENS: -- in this case the judge did
21 not reconsider until the end of the defense case?

22 MS. NEAVES: That is correct, Justice Stevens.

23 JUSTICE STEVENS: Now, during that period, did
24 the defense lawyer have the right to rely on the acquittal
25 in deciding whether or not to put in defensive evidence on

1 the count from which he thought his client had been
2 acquitted?

3 MS. NEAVES: Well, he certainly had some sense
4 of reliance, but it wasn't a double jeopardy reliance.
5 And I would -- I would point the Court to --

6 JUSTICE STEVENS: Of course, if the Double
7 Jeopardy Clause did apply, if it were treated as a true
8 acquittal, he could just say, well, we can forget about
9 that, send your witnesses home, we won't have to worry
10 about it.

11 I understand under your view they could send the
12 witnesses home, and a week -- a week later the judge could
13 say, well, we haven't submitted it to the jury, I've
14 decided to change my mind. You could bring all those
15 witnesses back. That's the way you think it should work.

16 MS. NEAVES: Absolutely, Justice Stevens. And I
17 think --

18 JUSTICE BREYER: What -- what about a judge who
19 thinks -- should the judge -- should a judge in trial be
20 able to change his mind as long as the jury is still
21 there? Yes.

22 MS. NEAVES: Yes.

23 JUSTICE BREYER: Should you be able to take an
24 appeal in the same circumstance while the jury is still
25 there? No.

1 Now, suppose a judge thinks both those things.
2 Is that judge, like me, for example, hopelessly confused?

3 (Laughter.)

4 JUSTICE BREYER: Is the judge thinking
5 contradictory things or is there a way of reconciling
6 those two instincts?

7 MS. NEAVES: I -- Justice Breyer, I -- I
8 certainly believe that the -- that the double jeopardy
9 rule that we're -- we're advocating would permit that, but
10 I -- I think that most trial judges would not be very
11 pleased about doing something like that. And practically
12 speaking, there's --

13 JUSTICE BREYER: By the way, if it's
14 constitutional, it's pretty easy to see a State might well
15 say, let's do that, what a good idea. I mean, they might
16 think it's a good idea. I don't know what people think is
17 a good idea. We'll provide for interlocutory appeals
18 right in the middle of cases because the prosecution can
19 never appeal at the end of the case. That's really
20 unfair. And we'll do this little thing here, and that way
21 we give the prosecutor a chance.

22 MS. NEAVES: I -- I have to stick with the rule
23 that -- that --

24 JUSTICE BREYER: All right. You think it's --
25 I'm just inconsistent.

1 MS. NEAVES: I think it -- I -- well, it's --
2 it's -- I think if -- I think if you accept the notion
3 that jury discharge is what matters for purposes of the
4 Double Jeopardy Clause and permitting a trial judge to
5 reconsider a legal ruling up to that point, then if a
6 State court could fashion an interlocutory review process
7 of that legal ruling, that would not violate the Double
8 Jeopardy Clause.

9 JUSTICE SCALIA: What is the conceptual basis
10 for saying that jury discharge makes the difference? Why
11 is that the touchstone?

12 MS. NEAVES: I think this Court has said over
13 and over again that it is the jury -- the defendant's
14 right to hold onto his chosen jury that matters in a
15 number of different contexts in the double jeopardy area.
16 This Court has drawn the line at attachment of jeopardy
17 when the jury is empaneled and sworn based on the
18 historical value of a defendant having that particular
19 jury resolve the government's case against him. And so I
20 think that it matters, particularly where a motion for a
21 required finding is not constitutionally mandated. It's a
22 tool that --

23 JUSTICE O'CONNOR: I would think prejudice to
24 the defendant should be a factor, and if the defendant is
25 misled by what the judge says into not putting on part of

1 the case that otherwise would have been put on, that's a
2 pretty serious matter.

3 MS. NEAVES: That is a very serious matter, and
4 it is the sort of prejudice that falls within the rubric
5 of due process and -- and --

6 JUSTICE SCALIA: No, but we usually don't use --

7 MS. NEAVES: -- would grant you a retrial.

8 JUSTICE SCALIA: -- we don't use the -- I mean,
9 you could use the Due Process Clause for everything, for
10 double jeopardy, for all of the other protections in the
11 Constitution. I think our cases say if -- if there's a
12 problem that has been created by ignoring the double
13 jeopardy rules, you don't solve that problem by -- by the
14 deus ex machina of the Due Process Clause.

15 MS. NEAVES: No. That's -- that's exactly
16 correct.

17 JUSTICE BREYER: What about --

18 JUSTICE SCALIA: So this a problem created by
19 the judge's dismissal, which this defendant had every
20 reason to rely upon as being the end of that part of the
21 case. I'm inclined to say if -- if that is a problem, in
22 fairness it's a -- it's a double jeopardy problem, not a
23 due process problem.

24 MS. NEAVES: Well, with respect, Justice Scalia,
25 I would say it is the sort of reliance that a -- that a

1 defendant may have, as for example the case in Sanabria,
2 where a -- where a judge excludes certain evidence, and
3 the case goes forward. And as a result of that -- a
4 result of that decision, the judge in that case granted a
5 motion for acquittal. And at the end of the case, the
6 prosecution asked for reconsideration of the exclusion of
7 the evidence, and the judge ultimately determined not to
8 go ahead and let that evidence back in, but specifically
9 said if I had let it back in, I would have vacated my
10 motion for required finding and allowed the case to go to
11 the jury. So that sort of prejudice -- a defendant has an
12 expectation of certain things that may or may not happen
13 at trial, but the remedy outside of the double jeopardy
14 context, if the defendant is acquitted, is a retrial.

15 The drastic remedy of double jeopardy is -- is
16 used when a defendant has been subjected twice to a trial
17 before a second trier of fact. This -- this Court has
18 been consistent that when the government subjects the
19 defendant over and over again before a second --

20 JUSTICE STEVENS: Did I understand you correctly
21 to say that if the defendant is acquitted, the remedy is a
22 retrial?

23 MS. NEAVES: No, no, no. I'm sorry, Justice
24 Stevens. No. Only if the defendant is convicted is the
25 remedy a retrial because, indeed, if the jury acquits him,

1 there is no harm at all.

2 JUSTICE BREYER: What is the reason you didn't
3 want a fairly simple rule that I was thinking of? I'll
4 tell you what it is and you'll tell me honestly why you
5 don't.

6 It's final. The word acquittal is -- is final
7 if the jury has been discharged or the decision is sent to
8 another body for review. One or the other.

9 MS. NEAVES: I could live with that rule.

10 JUSTICE BREYER: Now, so you haven't found
11 something in your research that suggests that -- that --

12 MS. NEAVES: No, no. Our position has been
13 consistent.

14 JUSTICE KENNEDY: Well, under -- under that view
15 of things, suppose in this -- in this case there's a
16 motion for acquittal and the judge says, yes, I -- I think
17 there's no evidence on the gun. Then the prosecutor says
18 I want 10 minutes because I think there's a case on it.
19 Then he says, you know, there's a case and I think it
20 covers this, and the judge says, well, I think you may be
21 wrong. I'll let you reopen to put on evidence of -- of
22 the gun. What would -- what would be the result in that
23 case?

24 MS. NEAVES: I think that because if it's a jury
25 trial and the case is still -- and the jury is still

1 there, it could be done without violating the Double
2 Jeopardy Clause.

3 JUSTICE KENNEDY: I think you have to say that
4 under your view.

5 MS. NEAVES: I think so. I think honing -- what
6 this Court has talked about in honing is -- is refining a
7 case before a second trier of fact. And as a matter of
8 Massachusetts' procedures, certainly the prosecution may
9 be able to reopen if there's good faith or mistake, but
10 for purposes of --

11 JUSTICE GINSBURG: Then why did the
12 Massachusetts Supreme Court say -- and I thought it did
13 say this in its rules -- trial judge, you rule on the spot
14 when a motion to acquit is made? We will not allow you to
15 reserve judgment. Because the normal thing would be a
16 trial judge would say, why should I decide this
17 definitively now? I'll wait till the end of the case.
18 But as I understand the Massachusetts rules, it says,
19 judge, you can't reserve on a motion to acquit. You must
20 rule immediately.

21 MS. NEAVES: That is correct, Justice Ginsburg,
22 and if I misunderstood the hypothetical, that -- that was
23 my mistake. As a matter of Massachusetts law, a trial
24 judge does not have that option. She must rule on the
25 motion before the defendant decides to put on the case,

1 and that is what happened here.

2 JUSTICE GINSBURG: So -- so part of Justice
3 Breyer's question needs editing because it would not be
4 possible under Massachusetts law for the judge to say --

5 MS. NEAVES: That is correct.

6 JUSTICE GINSBURG: -- I reserve.

7 MS. NEAVES: That is correct. She could not.

8 And -- and if I could just highlight a couple of
9 points to -- to demonstrate the significance of -- of
10 permitting trial judges the ability to reconsider legal
11 rulings. In Massachusetts, the fact that there's a
12 written motion here is quite unusual. These motions are
13 made orally generally. The prosecution is not given an
14 opportunity -- does not -- there's no requirement that he
15 be given advance notice ever. There's no requirement of
16 that. The prosecution argues in opposition to the motion
17 on the spot, and the judge rules on the spot.

18 And -- and I think that -- that procedure is
19 demonstrated quite clearly here. The -- the defendant
20 filed the motion. The prosecution did, indeed, argue the
21 correct response, legal response, did not have a case at
22 hand and as --

23 JUSTICE STEVENS: Yes, but your position would
24 be the same if the -- if the Massachusetts law provided
25 that the motions at the end of the prosecution's case

1 shall not be ruled on unless -- after they're written
2 briefs filed by both sides and they have 3 days of
3 argument. You'd still have the same position.

4 MS. NEAVES: That's true.

5 JUSTICE SCALIA: And in fact, the -- the quick
6 and dirty procedure you describe is probably a boon to
7 prosecutors because a judge is -- is not likely to take
8 the serious step of dismissing a charge on the basis of --
9 of such a procedure and is more likely to say, well, we'll
10 let the trial go ahead and see what the evidence
11 discloses. I mean, I can't imagine that this is not a
12 boon to the prosecutor rather than, as you -- as you seem
13 to paint it here, a disadvantage.

14 MS. NEAVES: I -- I wouldn't want to
15 characterize --

16 JUSTICE SCALIA: This is a very unusual judge I
17 would think to --

18 MS. NEAVES: Yes.

19 JUSTICE SCALIA: -- to whip it out like that and
20 -- and enter an acquittal without -- without letting it go
21 forward.

22 MS. NEAVES: I would say it is unusual, but it
23 happens where -- and I think the trial judge certainly in
24 this case who believes that if she's mistaken, can -- can
25 correct her ruling and send it to the jury, then feels

1 somewhat free to -- to do what the defendant asks, if it
2 seems reasonable, and -- and knows that if -- if it can be
3 corrected --

4 JUSTICE SCALIA: You may -- you may regret what
5 you've asked for.

6 MS. NEAVES: I hope not, Justice Scalia. I hope
7 not.

8 I think --

9 JUSTICE GINSBURG: What would happen -- I think
10 one of the briefs suggested that suppose you have a multi-
11 defendant case and the judge says, after the prosecution
12 case is done, defendant A, I'm going to grant a motion to
13 acquit. He's out of it, but there was enough evidence to
14 require the -- the defense to go on for B and C. And then
15 after hearing B and C's defense, the judge said, I think I
16 was wrong about acquitting A, so I'm -- I'm going to
17 withdraw it. Would there be -- could that be done without
18 any -- any double jeopardy bar? The jury hasn't been
19 discharged.

20 MS. NEAVES: Justice Ginsburg, I don't think it
21 presents a double jeopardy bar, but a defendant has a
22 right to be present at his trial, and so it certainly
23 would be a reversible error if -- if a trial judge --

24 JUSTICE GINSBURG: No. The -- the -- he's
25 sitting there. Defendant A is sitting there throughout

1 the whole trial.

2 MS. NEAVES: Then there's certainly no double
3 jeopardy bar to that.

4 JUSTICE BREYER: There could be a problem that
5 you have to have a fair chance to present evidence and so
6 forth.

7 MS. NEAVES: Absolutely, Justice Breyer, and --
8 and --

9 JUSTICE BREYER: I guess there are a lot of
10 rules in Massachusetts that deal with that. They can't --
11 you have to be fair to the defendant in -- is that right?

12 MS. NEAVES: Well, certainly. Rule 25 itself
13 specifically states that the defendant shall have the
14 opportunity to present evidence after the motion is denied
15 or allowed in part without reserving that right. So
16 certainly that option is available.

17 Unless the Court has further questions.

18 JUSTICE STEVENS: Thank you, Ms. Neaves.

19 MS. NEAVES: Thank you.

20 JUSTICE STEVENS: Mr. -- Mr. Srinivasan.

21 ORAL ARGUMENT OF SRI SRINIVASAN

22 ON BEHALF OF THE UNITED STATES,

23 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

24 MR. SRINIVASAN: Thank you, Justice Stevens, and
25 may it please the Court:

1 The trial court in this case was permitted to
2 correct its erroneous ruling in favor of the defendant on
3 the motion for judgment of acquittal. Because the
4 prosecution is entitled to a full and fair opportunity to
5 prove its a case, that's a value --

6 JUSTICE STEVENS: May I ask you the same
7 question I asked your -- your colleague? Supposing we're
8 not in Massachusetts, but we're in another State that
9 provided for an interlocutory appeal immediately after the
10 judge's ruling in this case. Would -- would you have the
11 same appraisal of the case on those facts?

12 MR. SRINIVASAN: Would we have the same
13 appraisal as the State? We don't --

14 JUSTICE STEVENS: Yes. Would you still say it
15 was not final, even though it was sufficiently final for
16 appellate purposes?

17 MR. SRINIVASAN: No. We -- we think that the
18 Court's holding in Smalis applies equally to jury trials
19 and to bench trials such that an appeal, an interlocutory
20 appeal, in the midst of a jury trial would not be
21 permissible. But we also think that there is a sound
22 basis for drawing a distinction between --

23 JUSTICE STEVENS: But my question is assuming a
24 State procedure in which the interlocutory appeal was
25 permissible, you -- you would say the Double Jeopardy

1 Clause would bar that appeal.

2 MR. SRINIVASAN: Right, because we read that to
3 be the holding of Smalis.

4 But we think there's a basis for distinguishing
5 between appeals on one hand and continuing proceedings
6 before the initial tribunal on the other hand. First of
7 all, this Court has drawn that distinction in Swisher v.
8 Brady where it initially said that the two-stage system of
9 adjudication is -- in Maryland that was at issue in that
10 case was permissible because it entailed continued
11 proceedings before the initial tribunal rather than an
12 appeal to a second tribunal. And the Court specifically
13 distinguished its prior decisions in Jenkins v. the United
14 States and Kepner, both of which involved appellate
15 review.

16 And the other basis for drawing a distinction
17 between appeals on one hand and reconsiderations by the
18 trial court on the other is historical tradition. I think
19 the Court could look to history and history would show
20 that on one hand trial courts have always had inherent
21 authority to reconsider their mid-trial rulings because
22 the practical exigencies of trial are such that trial
23 courts inevitably will err on occasion, and the ends of
24 justice require trial courts to have the authority to
25 revisit their mid-trial rulings.

1 JUSTICE KENNEDY: Would -- would you allow a
2 trial judge to reopen -- to -- to permit the prosecution
3 to reopen the case?

4 MR. SRINIVASAN: We would, Justice Kennedy, but
5 it raises a distinct problem because one value that's
6 served by the Double Jeopardy Clause is the defendant's
7 interest in preventing the prosecution from honing its
8 evidentiary case by repeated efforts. And if the trial
9 judge were permitted to reopen the case to give the
10 prosecution that opportunity, it at least would implicate
11 that interest.

12 Now, we still think that the proper line is jury
13 discharge, but we understand that that hypothetical would
14 present a distinct interest.

15 Now, with respect to historical tradition on
16 appeals, the historical tradition is clear that the
17 government has lacked authority at common law to take an
18 appeal in a criminal proceeding. This Court relied on
19 that common law tradition as early as *Sanges v. the United*
20 *States* and it's repeated that understanding in *Carroll v.*
21 *the United States* and *Arizona v. Manypenny*, and that's why
22 the Court construes statutory grants of authority to the
23 government to take an appeal in criminal cases quite
24 narrowly. And so I think the Court could draw a
25 distinction between reconsiderations by the trial court

1 and appeals by looking to historical tradition, and the
2 Court often looks at history to shape the contours of
3 double jeopardy protections. And that would afford the
4 case -- the Court a basis for saying that in Smalis, while
5 appeals were forbidden, in this case trial court
6 reconsideration should be permitted.

7 And I think the lens through which the Court
8 would do that under the Double Jeopardy Clause is the
9 valued interest in giving the prosecution one full and
10 fair opportunity to prove its case in the sense that while
11 that full and fair opportunity may exclude an appeal,
12 because the Court held as much in Smalis, it doesn't
13 exclude reconsiderations.

14 JUSTICE SOUTER: Why -- why doesn't the -- the
15 prosecution gets its full and fair opportunity if we have
16 a rule that says to trial judges, when you make a ruling
17 on acquittal, you better be serious and you better not
18 make a snap judgment, think it over, because once you've
19 done it, it sticks? Why -- why doesn't the prosecution
20 have a perfectly fair opportunity under that rule?
21 Everybody knows where he stands and judges, we hope, are
22 going to be careful.

23 MR. SRINIVASAN: Justice Souter, we think a
24 constitutional rule that would turn on the definitiveness
25 of a trial court ruling would be flawed in three respects.

1 First, the line between a definitive ruling and
2 a tentative ruling is not altogether clear, and we've
3 outlined in our brief at page 24 in a lengthy footnote a
4 variety of factual scenarios that come from real cases
5 where trial judges, as they often do, rendered a ruling on
6 a motion for acquittal orally, and whether you think that
7 ruling was definitive or tentative might depend on which
8 page of the transcript you happen to be looking at.

9 But even if we're dealing with a situation in
10 which the ruling clearly falls on the definitive side of
11 the line, you'd still have the problem that a trial court
12 might be convinced that it's correct and rule definitively
13 but still be incorrect. Trial courts make mistakes.
14 That's why this issue comes up as often as it does. For
15 example, in this case --

16 JUSTICE STEVENS: In all these cases -- we've
17 had several, not too many over the -- the whole line of
18 cases -- and the trial judge has always committed a rather
19 plain error. And we all have the case where if you just
20 try to decide whether it's a just result, you'd always say
21 no. A case just like this. The judge made a mistake, but
22 we've always said that's not something we -- we look at.

23 MR. SRINIVASAN: I don't -- I'm not quite sure
24 I'm following what you're saying, Justice Stevens,
25 because --

1 JUSTICE STEVENS: I say as a typical matter
2 these double jeopardy claims arise in cases in which the
3 judge made a rather plain error, and when you look at it
4 later, you say, gee, he goofed. And so I'm not sure we
5 should consider the plainness of the error or the fact
6 that they -- they do mistakes because they do.

7 MR. SRINIVASAN: But -- but I don't -- but the
8 reason why the Court accepts errors in some situations is
9 because there's some other value under the Double Jeopardy
10 Clause.

11 JUSTICE STEVENS: The value of finality is what
12 is really at stake here.

13 MR. SRINIVASAN: Well, it's not just the value
14 of finality. It's that, for example, if the judge makes
15 an error and then the jury is discharged, it's the value
16 that the defendant has in obtaining a result from the
17 particular tribunal. In the circumstances of this case,
18 where the trial judge can correct for error within the --
19 within a matter of minutes, at least in some situations,
20 there would be no double jeopardy purpose served --

21 JUSTICE STEVENS: But here it was not a matter
22 of minutes.

23 MR. SRINIVASAN: In this --

24 JUSTICE STEVENS: Here it was --

25 MR. SRINIVASAN: No. I acknowledge in this case

1 it wasn't, but it might well be in some cases. For
2 example, we cite a decision of the Washington Supreme
3 Court, State v. Collins, which involves essentially the
4 same scenario as this case, but the only distinction was
5 that after the trial judge initially announced her ruling,
6 the prosecution had the precedent in hand and within a
7 span of 10 minutes, the trial judge was able to realize
8 her error and to correct her ruling and reinstate the
9 charge.

10 JUSTICE O'CONNOR: Does it matter if the -- if
11 the ruling is conveyed to the jury even though the jury
12 isn't discharged?

13 MR. SRINIVASAN: It would matter, Justice
14 O'Connor, but I don't think it would necessarily preclude
15 the prosecution from going forward on the charge under the
16 Double Jeopardy Clause. The question would be one of due
17 process and prejudice to the defendant.

18 JUSTICE KENNEDY: You had three -- three reasons
19 you were going to give Justice Souter. One is it's not
20 clear always that it's definitive. The other is that
21 trial judges do make mistakes, and the third is?

22 MR. SRINIVASAN: And the third is -- it's an
23 issue that you raised earlier, Justice Kennedy. It's that
24 this case might look different as an atmospheric matter if
25 the trial judge at the time she rendered her ruling had

1 said, I'm ruling in the defendant's favor, but I may
2 reconsider this decision at a later point in the
3 proceedings. Now, that might be seen to fall on the
4 tentative side of the line, but that's exactly the effect
5 of this -- of the trial judge's ruling as a matter of
6 Massachusetts law. And we don't think there's a
7 constitutionally significant distinction between a trial
8 judge explicitly saying that a ruling can be reconsidered
9 and State law saying that the ruling can be reconsidered.

10 JUSTICE SOUTER: Why isn't the distinction the
11 right to rely?

12 MR. SRINIVASAN: It -- there -- there -- that
13 would be the basis of a claim, Justice Souter, but the
14 right to rely is, in essence, a notice prejudice sort of
15 claim and that could be handled in the way that trial
16 courts typically handle claims by the defendant that
17 they've detrimentally relied on an initial ruling the
18 trial court has subsequently reconsidered.

19 It would be equally the case, for example, as
20 the State mentioned with respect to an evidentiary ruling
21 that barred the prosecution from introducing a category of
22 evidence, but then the trial judge, later in the
23 proceedings, wanted to revisit that ruling. The question
24 would be whether revisiting the ruling resulted in
25 prejudice to the defendant because the defendant had

1 detrimentally relied on the trial judge's initial
2 determination. And we don't think that prejudice inquiry
3 is meaningfully different when you're dealing with
4 evidentiary rulings as when you're -- as when you're
5 dealing with the reinstatement of a previously acquitted
6 charge.

7 JUSTICE SCALIA: Why -- why shouldn't you have
8 -- what's magic about the jury? Why shouldn't you have
9 the same rule on a bench trial? A judge in a bench trial
10 makes a ruling, thinks about it, and says, you know, I
11 shouldn't have ruled that way. Why shouldn't that judge
12 be able to change? Just because there's no jury to
13 discharge.

14 MR. SRINIVASAN: Well, it would depend. If --
15 if the bench trial judge were making a mid-trial ruling,
16 as -- as in this case, then the judge could change his or
17 her mind. But if the bench trial judge were resolving the
18 entire case and entered --

19 JUSTICE SCALIA: What -- what is the line? I
20 mean, is there -- there no point at which he can't change?
21 I mean --

22 MR. SRINIVASAN: No. The -- the -- I think the
23 Constitution would step in and impose a line at some
24 point, and probably the best indicator is a rule --

25 JUSTICE SCALIA: But it's not dismissal of the

1 jury. We'll have to make up some other line. Right?

2 MR. SRINIVASAN: It can't be discharge of the
3 jury, but I think where the Court would look, first and
4 foremost, in defining a line for bench trials, if the
5 issue would ever arise, would be a ruling that would
6 essentially have resulted in discharge of the jury if the
7 trial were before a jury. And for example, the Federal
8 Rules of Criminal Procedure --

9 JUSTICE O'CONNOR: But how do we -- how does
10 Smalis fit into this discussion? I thought in Smalis in a
11 bench trial, we said it was final.

12 MR. SRINIVASAN: It was, Justice O'Connor, for
13 purposes of an appeal, and that's why I think the critical
14 distinction between Smalis and this case is that where the
15 prosecution might not have authority to take an appeal
16 from a ruling on the insufficiency of the evidence.

17 JUSTICE KENNEDY: Your line would be something
18 like if it -- if -- from all of the transcript, it appears
19 that the judge is -- is giving consideration to the entire
20 case or something like that in a bench trial.

21 MR. SRINIVASAN: In a bench trial, that -- that
22 would be part of the inquiry, Justice Kennedy, and I would
23 also point, by the way, to -- can I just finish the
24 thought, Justice Stevens? To Federal Rule of Criminal
25 Procedure 32(k)(1), which says that when a bench trial --

1 when a judge sitting in a bench trial issues a ruling that
2 finds a defendant not guilty, that ruling will discharge
3 the defendant. And I think a discharge of the defendant
4 would be one of critical consideration.

5 Thank you.

6 JUSTICE STEVENS: Thank you.

7 Mr. Nathanson, you have about 3 minutes left.

8 REBUTTAL ARGUMENT OF DAVID J. NATHANSON

9 ON BEHALF OF THE PETITIONER

10 MR. NATHANSON: Justice Stevens, may it please
11 the Court:

12 I'll try to be as brief as I can.

13 The argument about inherent authority to
14 reconsider an acquittal really has it backwards. Inherent
15 authority bends to the Constitution. The Constitution
16 does not bend to a judge's inherent authority.

17 Second, the -- the Government is trying to
18 substitute a standard here of a second proceeding, which
19 is not this Court's standard. This Court's standard is
20 further proceedings after an acquittal, including
21 resumption of the same trial. That's what this Court said
22 in Smalis.

23 The Government is also trying to move this case
24 into the particular tribunal analysis. That comes from
25 cases that are mistrials. This is an acquittal. This is

1 not a particular tribunal case.

2 As to the judge resolving all the issues in a
3 bench trial and -- and that's why that -- that acquittal
4 would be more final than a motion for a directed verdict,
5 it was a motion for a directed verdict. It was a demurrer
6 in Smalis. It was the exact same standard that the judge
7 applied in that case.

8 As to prejudice, prejudice has never been a
9 factor in this Court's double jeopardy analysis. As a
10 matter of fact, in -- in one of the really classical
11 statements, Ex parte Lange, if you look at the facts of
12 that case, that looks like complete gamesmanship. The
13 defendant was sentenced to a jail term and a fine when the
14 -- the statute only authorized a jail term or a fine. He
15 said, oh, I'll pay -- I'll pay the fine. It's a get-out-
16 of-jail-free card. There's complete gamesmanship, but
17 prejudice was not a factor. And in fact, this Court has
18 said prejudice is not open to judicial examination in
19 double jeopardy cases.

20 As to honing, in -- in fact, in Rumsey --

21 JUSTICE SCALIA: Honing?

22 MR. NATHANSON: Honing. Not the name of a case,
23 Your Honor. But whether or not the Government has honed
24 its cases through -- and -- and they would say evidentiary
25 honing. But it's not evidentiary honing. In Rumsey, it

1 was only argument that was presented at -- at the remand
2 after acquittal.

3 Justice Souter, I want to heartily endorse the
4 -- the way you phrased what the rule should be, which is,
5 trial judges, you ought to take this seriously.
6 Pretermittting the prosecution's case is a very serious
7 matter. You cannot take it back. So think about it. Do
8 it right the first time.

9 As to -- to rule 25 itself, it's true that the
10 -- the judges can't reserve. So what they do as -- as a
11 matter of practice in Massachusetts is they simply deny,
12 and -- and they deny the first one and they have two more
13 opportunities, one at the close of the defendant's case
14 and they have an opportunity at the close of -- after the
15 jury has returned a verdict. At each of those steps, they
16 can make a motion for acquittal.

17 As to the full and fair opportunity, this Court
18 said in Martin Linen that the Government has a right to
19 try the case. They do not have a right to have it proceed
20 to verdict. I'm just taking that straight from Martin
21 Linen.

22 As to, finally, whether or not State law sort of
23 insulates this from Federal -- I see my time is up. Thank
24 you.

25 JUSTICE STEVENS: Mr. Nathanson, thank you.

1 The case is submitted.
2 (Whereupon, at 12:01 p.m., the case in the
3 above-entitled matter was submitted.)
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